RECORD AND BRIEFS

No. 15-1491

In The

Supreme Court of the United States

BASIL J. MUSNUFF,

Petitioner,

v.

LEROY HAEGER, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition, where, contrary to Petitioner's assertions, the Ninth Circuit did not adopt a "no-causal-link rule," but instead expressly held that Petitioner's bad faith conduct "*caused* significant harm in forcing the Haegers to engage in sham litigation," and the Ninth Circuit even carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded" (App. 33 (emphasis added)), thereby embracing this Court's prior determination in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (awarding full attorney fees due to the frequency and severity of the misconduct).

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the district court's reliance on its inherent power is consistent with this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), and the bad faith misconduct was not discovered until after the case was settled.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE PETITION	10
I. CONTRARY TO MUSNUFF'S ASSERTIONS, THE NINTH CIRCUIT DID NOT ABANDON THE CAUSATION REQUIREMENT	10
II. CONTRARY TO MUSNUFF'S ASSERTION, THE NINTH CIRCUIT DID NOT CIRCUMVENT DISCOVERY RULE PROCEDURES	13
CONCLUSION	18

TABLE OF AUTHORITIES

Page

CASES

Amadeo v. Zant, 486 U.S. 214 (1988) 4

Chambers v. NASCO, Inc., 501 U.S. 32 (1991) ..... *passim*

DLC Management Corp. v. Town of Hyde Park, 163 F.3d 124 (2d Cir. 1998) 15

Malautea v. Suzuki Motor Co., 987 F.2d 1536 (11th Cir. 1993) 15

STATUTES

28 U.S.C. § 1927 15

RULES

Fed. R. Civ. P. 26(g) 14, 15

Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment 14

Fed. R. Civ. P. 26(g)(3) 14

Fed. R. Civ. P. 37 ..... *passim*

Sup. Ct. R. 10 3

INTRODUCTION

The underlying proceedings and resulting decisions by the district court and the Ninth Circuit address carefully-orchestrated fraud involving years of willful deceptions, including bad faith discovery conduct, repeated misrepresentations to the court and the Haegers, and false deposition testimony during discovery – all of which reduced the litigation to a charade, but none of which was discovered until after the case had been settled. These deceptions concealed, for the entire five years of litigation, critically-important test data which the Haegers had requested regarding the Goodyear G159 tire, and sent the Haegers on a completely misdirected frolic. The district court found these deceptions so extensive that they "permeated the entirety of this case," App. 65, and the Ninth Circuit agreed that Petitioner's misconduct "caused significant harm in forcing the Haegers to engage in sham litigation and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses." App. 33.

During more than two years of post-settlement, sanctions-related litigation in the district court, Goodyear and its lawyers – including this Petitioner Basil Musnuff – filed fifteen briefs, participated in discovery and presented testimony at a six-hour evidentiary hearing. After that thorough process, the district court painstakingly detailed in a 66-page order a long list of sanctionable misconduct, which "continued throughout the entire litigation, including post-dismissal." App. 179; *see generally* App. 93-194. The order included

49 pages of findings of fact and 17 pages of legal analysis and conclusions. App. 7.

Ultimately, relying upon the date of the first definitive proof that Goodyear was treating litigation as a game of hide and seek, the district court held that "the most appropriate sanction is to award Plaintiffs [the Haegers] *all* of the attorneys' fees and costs they incurred after Goodyear served its supplemental responses to Plaintiffs' First Request."[1] App. 171 (emphasis in original). The court found Musnuff jointly responsible (along with Goodyear) for 80% of that amount, or $2,192,960.93. App. 170-71, 191.

The Ninth Circuit unanimously upheld the district court's findings that Goodyear and its attorneys engaged in bad faith, sanctionable misconduct. App. 20 ("the district court did not abuse its discretion in finding clear and convincing evidence of bad faith by the Sanctionees in this case"); App. 47-48 (Watford, J., dissenting) (stating that the district court "approached the task . . . with great thoroughness and care," and "I agree with the majority that the district court's misconduct findings are supported by the record"). The panel also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 23 ("We hold that it was not an abuse of discretion for the district court to rely on its inherent power to sanction the

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[1] Goodyear's supplemental responses were provided on November 1, 2006, seventeen months after the suit was commenced. App. 100. The district court rejected the Haegers' request that all fees be awarded for the entirety of the litigation which commenced in 2005. App. 171, 191.

conduct at issue in this case"); App. 48 (Watford, J., dissenting) ("The district court's finding of bad faith authorized it to levy sanctions under its inherent power.").

Musnuff has presented no compelling reasons for granting its petition. *See* Sup. Ct. R. 10. He first asserts that the Ninth Circuit erred by "abandoning the critical element of causation." Petition at 21. But that assertion is simply not true. The Ninth Circuit not only expressly found that the element of causation had been fully satisfied, but it also carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded." App. 33 (emphasis added). Moreover, Musnuff fails to disclose in his petition that Musnuff (and the other sanctionees) admitted in the district court that approximately $2,018,794 of the fee award was directly linked to the years of misconduct. ER 1352, 1389. That admission resulted in an alternative, contingent award which effectively moots most of Musnuff's causation argument.

Musnuff also asserts that the Ninth Circuit erred by relying on inherent power to sanction him, rather than Fed. R. Civ. P. 37, which rule he characterizes as "the only basis" for possible sanctions. Petition at 22. But this assertion does not warrant the Court's review because Rule 37 could not apply to most of the categories of misconduct for which sanctions were imposed, because (among other reasons) the misconduct was not discovered until after the case had settled. App. 7-8. In any event, this Court has held that a court may resort to its inherent power even when the conduct could also

be sanctioned under the rules. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules.").

Accordingly, this Court's review is unwarranted, and the Petition should be denied.

STATEMENT OF THE CASE

Even though the district court's findings of fact must be accepted as true on review unless clearly erroneous, *see Amadeo v. Zant*, 486 U.S. 214, 225-26 (1988) ("where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"), Musnuff improperly disregards the district court's findings. Instead (without even arguing that the district court's findings are clearly erroneous), Musnuff presents his own, one-sided and highly selective version of the facts, which the district court already rejected. Indeed, the district court specifically found that many aspects of Musnuff's version of the facts are unreasonable, not credible and even untruthful.[2]

[2] For example, in an effort to justify Goodyear's objections to the Haegers' first discovery requests (which objections the district court found were "not made in good faith," App. 183), Musnuff asserts that the Haegers did not state their defect theory in this case

Even Musnuff's two questions presented in his Petition are expressly premised on a misrepresentation that the sanctions were imposed merely for "non-disclosure of documents." Petition at i. However, the district court found numerous instances of misrepresentations to the court, false deposition testimony, frivolous deceptive declarations, a dizzying array of deceptions in filings and multiple willful misrepresentations during the evidentiary hearing. App. 93-192. Accordingly, most of Musnuff's assertions of fact are contrary to the actual, controlling facts.

The Haegers commenced this action against Goodyear in June 2005, alleging that defects in the design of Goodyear's G159 tire resulted in a motor home accident which caused severe harm to the Haegers. App. 8. Goodyear was represented by Basil Musnuff ("Musnuff") (an attorney with Roetzel & Andress, LPA, who acted as lead trial counsel and national coordinating counsel for all G159 cases throughout the country between 2003 and 2010), and Graeme Hancock ("Hancock") (an attorney with Fennemore Craig, P.C., who served as local counsel for Goodyear). App. 8. Goodyear

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until January 2007. Petition at 4. But the district court specifically rejected this "fact," finding that the representations "that Plaintiffs did not state the legal theory of this case until January 7, 2007 is incorrect . . . and now appears to have been part of a general strategy to obstruct and delay discovery," "despite knowing the precise defect theory and issues presented in the case, Mr. Musnuff . . . decided to make no effort to provide responsive documents" and "[t]hat decision is evidence that Mr. Musnuff and Goodyear were not operating in good faith." App. 97 n.5, 184.

was embroiled in G159 tire litigation commencing in 1999. App. 1126-27, n.13.

The Haegers' case theory was that, when the G159 tire is used on motor homes at highway speeds, the tire produces a level of heat which it was not designed to endure, leading to tire failure. App. 9-10. The Haegers repeatedly requested production of test data which would have revealed the operating temperature of the tire. App. 95-96, 99-102, 110, 117-18, 121-23. None was disclosed. When Goodyear and its attorneys were later forced to produce the concealed tests during the sanction proceedings, the tests revealed that Musnuff knew the tire was generating temperatures far in excess of 200 degrees at highway speeds. Evidence of temperatures above 200 degrees would have transformed this litigation because Goodyear's experts had admitted (knowing that Goodyear and its attorneys had concealed the damning test data) that "anything over 200 [degrees] could cause separation." App. 162-63.

Thus, the egregious misconduct of Goodyear and its attorneys deprived the Haegers of the crucial temperature evidence supporting their claims. Consequently, after five years of litigation based on a false set of facts Goodyear and its attorneys had created, resulting in completely misguided discovery, misdirected expert disclosures and wholly wasted motion practice, the Haegers and Goodyear reached a settlement on April 14, 2010. App. 14.[3]

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[3] Prior to the sanctions the parties filed 163 motions. App. 169.

Sometime after the settlement, the Haegers' counsel saw an article stating that Goodyear had produced in a Florida suit internal heat and speed testing related to the G159 tire which the Haegers had repeatedly requested but never received. App. 14. Goodyear eventually admitted that it had not disclosed the requested tests, but Goodyear and its attorneys attempted to justify that concealment with "a dizzying array of misstatements and simple falsehoods." App. 154.

On May 31, 2011, the Haegers filed a motion for sanctions. App. 15. After that motion had been fully briefed, the district court found that there were "serious questions regarding [Goodyear's] conduct in this case," and ordered Goodyear to produce "the test results at issue." App. 15. Even then, Goodyear disclosed only a single test (the Heat Rise test), "but kept numerous other tests concealed" which showed temperatures well in excess of 200 degrees at highway speeds. App. 15, 143.

On February 24, 2012, the district court issued a proposed order, in which the court described possible sanctionable misconduct, but also stated that the record did not indicate who was responsible for each instance of misconduct or the amount and allocation of sanctions. App. 15-16, 229. The district court then allowed Musnuff ample opportunity to respond to the matters addressed in the proposed order. Between

March and July of 2012, Goodyear, Musnuff and Hancock each filed multiple briefs, totaling 1,111 pages.[4] The district court also held a six-hour evidentiary hearing on March 22, 2012, at which both Musnuff and Hancock testified under oath. App. 16. At the conclusion of the hearing, the district court granted the Haegers' requests to conduct additional discovery to address representations made at the hearing.

On November 8, 2012, the district court issued a 66-page order, which carefully cataloged the sanctionable misconduct, which included concealing critical test data, making intentional misrepresentations to the court and the Haegers' counsel throughout all five years of the underlying litigation, and even lying to the court during the sanctions proceedings. App. 93-194.

In short, the district court found that Goodyear's sanctionable misconduct "began almost immediately after the case was filed and continued throughout the entire litigation, including post-dismissal," and "permeated the entirety of this case." App. 65, 179. It found based upon Goodyear's pattern and practice in G159 case that the case would have settled much earlier. App. 171. Musnuff has not challenged this finding as clearly erroneous.

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[4] ER 288-339, ER 340-56, ER 357-72, ER 395-408, ER 409-12, ER 413-96, ER 497-510, ER 511-33, ER 573-706, ER 873-1065, ER 1066-85, ER 1086-1108, ER 1200-42, ER 1247-50, ER 2163-2250, ER 2392-2513, ER 2541-95, ER 2596-2600, SER 082-127, SER 277-303, SER 304-318, SER 917-31, SER 953-73, SER 974-96, SER 997-1017, SER 1018-35.

The district court then turned to the task of crafting an appropriate sanction to compensate the Haegers for the harm caused by Goodyear's (and the others') pervasive misconduct. As the Ninth Circuit stated, "[t]he district court then conducted an exhaustive analysis of the documentation submitted by Plaintiffs," "spent considerable time reviewing *each* time entry," and "with painstaking attention to detail, made adjustments based on Goodyear's objections." App. 19 (emphasis in original). Ultimately, the district court reduced some of the fees and costs the Haegers sought, and found that the Haegers should be "reimbursed" a total of $2,741,201.16. *Id.* The district court held Hancock responsible for twenty percent of that amount, and "Musnuff and Goodyear were held jointly responsible for the remaining eighty percent of the fees and costs." *Id.*

The district court also made an alternative, smaller, "contingent award" which was intended to apply only if the full award was found on appeal not to have a sufficient causal link to the misconduct of Goodyear and its attorneys. App. 65, 70-71; ER 1272. Specifically, based on the admissions by Musnuff, Hancock and Goodyear that all but $722,406.52 of the fees and costs for which the Haegers sought reimbursement "result[ed] from Goodyear's allegedly sanctionable conduct," ER 1352; *see also* ER 1389 (Musnuff characterized the $722,406.52 amount as being "unrelated to [the] alleged harm"), the district court's alternative award reduced the sanction by $722,406.52 (or a total of $2,018,794.64). App. 71.

On appeal, the Ninth Circuit unanimously upheld the district court's findings that Goodyear (and the others) engaged in bad faith, sanctionable misconduct. App. 20, 47-48. It also unanimously upheld the district court's use of its inherent power to impose sanctions. App. 22, 48. The dissenting judge parted ways with the majority solely on the issue of whether there was a sufficient causal link between all the fees and costs awarded and the sanctioned misconduct. App. 55-56. Relying on this Court's holding in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991), that "the full attorney's fees were warranted [as a sanction] due to the frequency and severity of Chambers's abuses of the judicial system," the majority held that the district court "appropriately awarded the Haegers all their attorneys' fees and costs in prosecuting the action once the Sanctionees began flouting their clear discovery obligations and engaging in frequent and severe abuses of the judicial system." App. 34-35.

REASONS FOR DENYING THE PETITION

I. CONTRARY TO MUSNUFF'S ASSERTIONS, THE NINTH CIRCUIT DID NOT ABANDON THE CAUSATION REQUIREMENT.

Musnuff asks this Court to grant his petition based on his repeated accusation that the Ninth Circuit erroneously "abandon[ed] the critical element of causation." Petition at 21; *see also id.* at 11 (accusing the Ninth Circuit of holding that there is "no need to tailor 'compensatory' sanctions to the harm caused by

the sanctionable actions"); *id.* at 15 (the Ninth Circuit "simply did away with the necessary link between wrongful conduct and resulting harm"); *id.* at 17 (the Ninth Circuit adopted "a no-causal-link rule"). But Musnuff's accusation is wrong; the Ninth Circuit expressly found that the causation element had been fully satisfied in this case, and even carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded." App. 33 (emphasis added).

Far from "abandoning" the causation requirement, the Ninth Circuit expressly concluded that "there is no doubt that the Sanctionees' bad faith conduct *caused* significant harm in forcing the Haegers to engage in sham litigation, and in their likely foregoing millions of dollars in the settlement they accepted under false pretenses of the Sanctionees." App. 33 (emphasis added). Indeed, in addition to acknowledging the causation requirement, the Ninth Circuit also carefully "consider[ed] how close a *link* is required between the harm *caused* and the compensatory sanctions awarded when a court invokes its inherent power." App. 33 (emphasis added). Relying on this Court's decision in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), the Ninth Circuit held that the district court had appropriately awarded:

> the amount the court reasonably believed it cost the Haegers to litigate against a party and attorneys during the time when that party and those attorneys were acting in bad

> faith. Nothing more is required under *Chambers* or our case law. . . .

App. 37.

Furthermore, the Ninth Circuit concluded that the argument that something more than the causal link the district court found is needed to establish causation is "virtually identical to the causation requirement claim" this Court rejected in *Chambers*. App. 34-35 (quoting *Chambers*, 501 U.S. at 57 (rejecting the argument that "the fact that the entire amount of fees was awarded means that the District Court failed to tailor the sanction to the particular wrong," and upholding the district court's conclusion "that full attorney's fees were warranted due to the frequency and severity of Chambers' abuses")). The pervasive misconduct by Musnuff, Hancock and Goodyear in this case, rendering the entirety of five years of litigation a "sham," unquestionably supports a sanction of all the attorneys' fees and costs which the Haegers were forced to incur.

Moreover, Musnuff's suggestion that the Ninth Circuit abandoned the causation requirement is contradicted by his own admission (as well as the admissions of Hancock and Goodyear) that most of the fees and costs awarded to the Haegers – all but $722,406.52 – *are* causally linked to the sanctionees' misconduct. *See* ER 1389 (Musnuff argued that only $722,406.52 of all the fees and costs the Haegers sought were "unrelated to [the Haegers'] alleged harm"); ER 1352-54 (Goodyear argued that all but $722,406.52 were "fees

resulting from Goodyear's allegedly sanctionable conduct"); ER 1369 (Hancock argued that only $722,406.52 of the fees and costs the Haegers sought were "not directly attributable to sanctioned conduct").[5]

Accordingly, contrary to Musnuff's false accusation, the Ninth Circuit gave effect to the causation requirement when it held that "the district court did all it was required to do" to compensate the Haegers for the damages "they suffered as a *result* of Sanctionees' bad faith," including post dismissal. App. 31, 179 (emphasis added). Thus, because Musnuff's petition is based on a false premise, this Court's review is not warranted and the petition should be denied.

II. CONTRARY TO MUSNUFF'S ASSERTION, THE NINTH CIRCUIT DID NOT CIRCUMVENT DISCOVERY RULE PROCEDURES.

Musnuff also asks this Court to grant his petition based on his assertion that the district court improperly relied on its inherent power to impose sanctions instead of sanctions under Fed. R. Civ. P. 37. Musnuff's argument has no merit because: (1) Rule 37 is not the exclusive means for imposing sanctions for bad faith responses to the Haegers' first discovery requests; and (2) Goodyear's bad faith responses were just one of a

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[5] These admissions resulted in the district court's alternative, contingent award which Musnuff fails to mention in his petition. This alternative award was intended to apply only if the full award was found on appeal not to have a sufficient causal link to the misconduct of Goodyear and its attorneys. App. 65, 71.

long list of the sanctionees' misconduct for which sanctions were imposed, many of which simply are not covered by Rule 37.

The fundamental premise of Musnuff's Rule 37 argument is that, once Goodyear asserted "timely" objections to the Haegers' first discovery requests, "the only basis" for imposing sanctions on Goodyear or its attorneys was Rule 37, which requires that the Haegers first file a motion to compel and the district court enter an order which Goodyear then violates. That is plainly wrong. For example, under Rule 26(g), when an objection to a discovery request is "interposed for any improper purpose," a motion to compel, court order and violation of the order are not prerequisites to the imposition of sanctions. To the contrary, "the court, on motion or on its own, must impose an appropriate sanction on the signer [of the response], the party on whose behalf the signer was acting, or both." Rule 26(g)(3).[6]

Similarly, decisions by this Court and the various circuits confirm that Rule 37 is not the exclusive

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[6] Rule 26(g) was added in 1983 precisely because the then-existing discovery rules – including Rule 37 – could not adequately address violations of the "spirit of the rules." Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment (recognizing that "the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by . . . evasive responses," Rule 26(g) "imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37").

means to impose sanctions for bad-faith discovery responses. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991) ("But neither is a federal court forbidden to sanction bad-faith conduct by means of the inherent power simply because that conduct could also be sanctioned under the statute or the Rules."); *DLC Management Corp. v. Town of Hyde Park*, 163 F.3d 124, 135-36 (2d Cir. 1998) (rejecting argument that sanctions for late production of documents could be based only on Rule 37 and not inherent power); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544-55 (11th Cir. 1993) (sustaining sanctions against defendants and their attorneys under 28 U.S.C. § 1927 and Rule 26(g), in part, because "[t]hroughout discovery, the defendants, through their counsel, unreasonably objected to the plaintiff's requests for information and provided incomplete answers as part of their campaign to obfuscate the truth").

Moreover, because merely negligent conduct in responding to discovery requests is enough to impose sanctions under Rule 37, it makes sense to require that a party first be given notice that his responses are inadequate before imposing sanctions. But Rule 37's procedure makes no sense in the context of sanction tools, such as inherent power, that require the substantially higher standard of bad-faith conduct. For example, a party who acts in bad faith by knowingly asserting baseless objections to discovery requests for the improper purpose of concealing critical evidence has no right to be insulated from sanctions unless the other side first files a motion to compel, the court issues an

order compelling disclosure and the answering party violates that order. Such a party already knows full well that its bad-faith conduct is improper and sanctionable. Requiring Rule 37's procedures in the context of inherent power sanctions is unnecessary, would only serve to shield bad-faith conduct, and is not legally required.

But even if it could be argued that sanctions for the bad-faith responses to the Haegers' first discovery requests must follow Rule 37's procedures, Musnuff's argument improperly ignores the fact that those responses were just the beginning of a long list of bad-faith conduct on which the district court based the sanctions decision, most of which could not be addressed by Rule 37. The district court expressly found (and the Ninth Circuit unanimously upheld those findings) that the egregious misconduct which forms the basis for the district court sanction includes: (1) as part of their "general strategy to obstruct and delay discovery," the sanctionees falsely asserted that the Haegers "did not state the legal theory of their case until January 7, 2007" (App. 97, n.5); (2) the sanctionees falsely asserted that the Haegers' counsel agreed to withdraw the first discovery request (App. 103-04); (3) the sanctionees failed to search timely for requested documents (App. 104); (4) the sanctionees concealed tests responsive to the Haegers' third discovery request (App. 154, 185); (5) the sanctionees asserted false, deceptive and after-the-fact explanations and excuses in an attempt to evade responsibility for discovery violations (App. 106-07 n.7, 134-37, 154-55, 180); (6) the sanctionees

lied about the existence and availability of test data (App. 124-25); (7) the sanctionees delayed in producing requested materials for improper tactical reasons (App. 113-14, 184); (8) the sanctionees provided (and failed to correct) false deposition testimony (App. 186-87); (9) the sanctionees made (and failed to correct) false in-court statements (App. 187-90); and (10) the sanctionees made false and deceptive statements during the evidentiary hearing and other sanction proceedings (App. 158-68). Thus, Musnuff's assertion that sanctions were imposed in this case "based on Goodyear's alleged failure to respond to a single discovery request" (Petition at 3) is not even close to the truth.

Most of the misconduct for which Musnuff and the other sanctionees were sanctioned in this case falls outside the scope of Rule 37. This is particularly true because the sanctionees' egregious misconduct did not come to light until *after* the litigation had been settled and the case closed. App. 8. This Court has recognized that a court's reliance on its inherent power in these circumstances is uniquely appropriate. *Chambers*, 501 U.S. at 50 ("But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power."). Indeed, "requiring a court to first apply Rules and statutes containing sanctioning provisions to discrete occurrences before invoking inherent power to address remaining instances of sanctionable conduct would serve only to foster extensive and needless satellite litigation, which is contrary to the aim of the Rules themselves." *Id.* at 50-51.

As the Ninth Circuit unanimously held, the district court's reliance on its inherent power to sanction Musnuff was proper. Thus, this Court's review is not warranted and the petition should be denied.

CONCLUSION

Musnuff has not established any compelling reason for this Court to grant the Petition. Therefore, the Haegers respectfully request that the Petition be denied.

Respectfully submitted,

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